MOTION FILED
MAY 14 1981

No. 80-608

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF FOR THE APPELLANT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Statutes and regulations:

Act of Mar. 4, 1909, ch. 321, Section 184, 35 Stat. 1124, (18 U.S.C. 1694) 1, 3

18 U.S.C. 1696(a) 1

18 U.S.C. 1696(c) 1, 2, 5

18 U.S.C. 1725 ..... 1, 2, 3, 4

39 U.S.C. 601(a) 1, 2

39 C.F.R.:

Section 310.1(a)(3) 2

Section 310.3 2

Section 310.3(b) 3

Miscellaneous:

75 Cong. Rec. 5577 (1932) 3

Domestic Mail Manual:

Pt. 146 5

Pt. 151 5

45 Fed. Reg. (1980):

p. 56055 3

p. 59873 2

H.R. Rep. No. 709, 73d Cong., 2d Sess. (1934) ... 3

S. Rep. No. 742, 73d Cong., 2d Sess. (1934) 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-608

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FOR THE APPELLANT

Pursuant to Rules 35.5 and 35.6 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, moves for leave to file the attached supplemental brief.

The issue on this appeal is whether the prohibition in 18 U.S.C. 1725 against the deposit of mailable matter into letter boxes without payment of lawful postage is unconstitutional as applied to the member associations of appellee Council of Greenburgh Civic Associations. Appellees now have moved to file a supplemental, post-argument brief in which they contend that they are exempt from the prohibition in 18 U.S.C. 1725 by virtue of an exception in the criminal Private Express statutes, 18 U.S.C. 1696(c).

Appellees concede (Motion, at 1) that they did not raise this statutory argument in their brief on the merits and that they attempted to rely on it for the first time in this Court

during oral argument. " 'The fact that the issue was mentioned in argument does not bring the question properly before [the Court]' " (*Hankerson* v. *North Carolina*, 432 U.S. 233, 240 n.6 (1977), quoting *Mazer* v. *Stein*, 347 U.S. 201, 206 n.5 (1954)). Nor can appellees' failure properly to present the issue be excused in the circumstances of this case. They made the same argument—in a similarly belated fashion—during the first round of proceedings in the district court, when they contended for the first time in their reply brief on the government's motion to dismiss the complaint that 18 U.S.C. 1696(c) excuses them from the requirements of 18 U.S.C. 1725. See J.S. App. 31a n.4. The district court rejected this contention (*ibid.*), and appellees did not renew it in their brief on appeal from the district court's order dismissing the complaint. Because appellees long ago abandoned their statutory claim based on 18 U.S.C. 1696(c), they should not be permitted to resurrect it at this late date.

However, because the Court has not yet ruled on appellees' motion to file their supplemental brief, the attached brief is submitted to express the views of the Postal Service on this issue in the event the Court chooses to consider it.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-608

UNITED STATES POSTAL SERVICE, APPELLANT

v.

COUNCIL OF GREENBURGH CIVIC ASSOCIATIONS AND SAW MILL VALLEY CIVIC ASSOCIATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR THE APPELLANT

---

1. Appellees' contention, raised in their supplemental brief, that 18 U.S.C. 1696(c) exempts them from the prohibition in 18 U.S.C. 1725 is without merit. Appellees note that postage ordinarily must be paid on a letter or similar item both when it is sent through the mails and when it is carried "out of the mails." 39 U.S.C. 601(a).[1] In addition, the criminal Private Express statutes generally prohibit the private carriage or conveyance of letters over established mail routes by regular trips or at stated periods. 18 U.S.C. 1694, 1696(a). Congress has exempted from the criminal Private Express statutes the carriage of letters that relate to the "business of the carrier" (18 U.S.C. 1694) and the conveyance or transmission of letters "by private hands without

---

[1] 39 U.S.C. 601(a) provides that "[a] letter may be carried out of the mails" when certain conditions are satisfied, including that "the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope."

compensation" or "by special messenger employed for the particular occasion only" (18 U.S.C. 1696(c)). The Postal Service has recognized similar exceptions to the requirements of 39 U.S.C. 601(a). See 39 C.F.R. 310.3. Appellees argue that these explicit exceptions from the Private Express statutes implicitly also carve out an exception to the prohibition in 18 U.S.C. 1725 against the deposit of mailable matter in letter boxes without payment of postage. Thus, in this case, appellees assert that the distribution of their circulars by volunteers is "by private hands without compensation" for purposes of 18 U.S.C. 1696(c)[2] and that, as a result, the deposit of the circulars in letter boxes without payment of postage is not barred by 18 U.S.C. 1725.

Appellees fail to recognize that the Private Express statutes and 18 U.S.C. 1725 are addressed to quite different concerns. The Private Express statutes proscribe the carriage or conveyance of letters out of the mails; the exceptions to those statutes, where they apply, therefore merely permit a person to carry or convey letters out of the mails without payment of postage. Section 1725, on the other hand, requires payment of postage for the use of a facility—the letter box—that is used for the delivery of letters that are carried *in the mails*. Accordingly, the fact that appellees may be permitted to distribute their circulars out of the mails without payment of postage does not imply that they may avoid payment of postage even when they use part of

---

[2]Quite aside from the explicit *exceptions* to the Private Express statutes, the term "letter" is defined in the pertinent Postal Service regulations in a manner that excludes from coverage under those statutes any circulars that are not directed to specific persons or addresses but are, instead, distributed in a blanket fashion to all residences in a locale. See 39 C.F.R. 310.1(a)(3), as added, 45 Fed. Reg. 59873 (1980). However, as we explain in the text, whether or not appellees are exempt from, or even subject to, the Private Express statutes in their delivery of circulars out of the mails has no bearing on the application of Section 1725.

the postal delivery system in the course of their distribution. See 45 Fed. Reg. 56055 (1980).

In addition, the background of 18 U.S.C. 1725 demonstrates that it was enacted for the very purpose of preventing persons who could lawfully *convey* circulars and similar items out of the mails without payment of postage from using letter boxes, free of charge, to deposit those items at their destinations. The Committee reports on Section 1725 observe that business concerns had adopted the practice of having their bills and other materials delivered by private messenger[3] but using letter boxes intended for the mails to effectuate the delivery. H.R. Rep. No. 709, 73d Cong., 2d Sess. 1 (1934); S. Rep. No. 742, 73d Cong., 2d Sess. 1 (1934), quoted in our opening brief (at 4 n.3). Congress concluded that this practice was depriving the Post Office Department of revenues because, Congress believed, these items would be sent through the mails if the senders could not deposit them in letter boxes free of charge. *Ibid.* The same point was made during the floor debate on the predecessor bill in 1932, when Representative Mead explained that "where some large corporation withdraws a volume of mail from the Post Office Department and sets up a service of its own, we restrict the use of the mail receptacles to mail matter handled by the Post Office Department" (75 Cong. Rec. 5577 (1932)). Therefore, the fact that appellees, like the companies discussed in the legislative history, might claim an exemption from the Private Express statutes does not also implicitly exempt them from the separate prohibition in 18 U.S.C. 1725.[4]

---

[3]Companies using their own employees to deliver bills to customers would have fallen within the "business of the carrier" exception to the Private Express statutes, first enacted in 1909 (Act of Mar. 4, 1909, ch. 321, Section 184, 35 Stat. 1124) and now codified at 18 U.S.C. 1694. See also 39 C.F.R. 310.3(b).

[4]Moreover, an exemption from the Private Express statutes relating to the private carriage of letters does not render less important the

Indeed, appellees' argument that an exemption from the Private Express statutes necessarily implies an exemption from 18 U.S.C. 1725 as well would render the latter section superfluous. Where the Private Express statutes apply, the private conveyance of a letter without payment of lawful postage is illegal, whether or not the letter also is deposited in a letter box without payment of postage. Thus, it is only where the Private Express statutes do *not* apply and the letter therefore may be lawfully conveyed out of the mails without the payment of postage that the prohibition in 18 U.S.C. 1725 against deposit of a letter in a letter box without payment of postage has any independent force. Yet under appellees' argument, 18 U.S.C. 1725 would not apply in these very situations.

Appellees observe (Supp. Br. 1-2), however, that 18 U.S.C. 1725 prohibits the deposit into letter boxes of mailable matter on which no postage has been paid only when done "with intent to avoid payment of lawful postage thereon." In appellees' view, one must look outside of Section 1725 to determine when "lawful postage" is due. Because they assertedly are excused from the payment of postage for the conveyance of their circulars by volunteers, they contend that there is no lawful postage due on these circulars and that the volunteers who deposit the fliers in letter boxes without postage therefore do not have the requisite "intent to avoid payment of lawful postage." But contrary to appellees' contention, it is not necessary to look outside of Section 1725 to determine whether postage is due on material deposited in letter boxes. Section 1725 bars the deposit into letter boxes of "*any* mailable matter * * * on which no postage has been paid" (emphasis added). Thus, Section 1725 itself requires payment of postage for use of a letter

---

accomplishment of the other purposes furthered by 18 U.S.C. 1725—preventing the clutter of letter boxes, protecting the privacy of postal patrons, and enforcing postal theft statutes. See Brief for the Appellant, at 4 n.3, 20-22, App. 1a-2a; Reply Brief, at 2-4.

box, irrespective of whether some other statute also requires payment of postage for conveyance of the material prior to the point of its deposit in a letter box. The phrase on which appellees rely, referring to an intent to avoid payment of lawful postage, appears to have been designed only to excuse from *criminal* liability persons who deposit unstamped material into letter boxes by mistake or without being aware that postage must be paid on the material. The absence of criminal intent, of course, does not excuse the depositor from civil liability for the amount of postage due on such material. See Domestic Mail Manual, Pts. 146 and 151.[5]

---

[5]In a separate argument, appellees suggest that no fee for the deposit of material into a letter box "can be justified here, where appellees use no services of the Postal Service whatever" (Supp. Br. 3). Appellees are in error. If appellees were to use letter boxes for deposit of their circulars, they would benefit from the federal criminal statutes that protect letter boxes and material placed in them, as well as from the services of letter carriers and other personnel who enforce those statutes. In addition, Congress concluded that the clutter caused by deposit of such material itself warrants the imposition of a postage fee and that imposition of a fee for the use of letter boxes would constitute a reasonable incentive for senders of messages to use the mails. Appellees have not challenged the *amount* of postage due on the ground that they use only a limited portion of the postal delivery system. But such a challenge would be without merit in any event, because Congress and the Postal Service are not required to apportion postal charges according to the precise extent to which each individual letter burdens the postal system.

For the foregoing reasons, it is respectfully submitted that appellees' statutory argument based on 18 U.S.C. 1696(c) should be rejected.

WADE H. MCCREE, JR.
Solicitor General

MAY 1981

DOJ-1981-05